

Draft Rules

839-020-0004

Definitions

As used in ORS 653.010 to 653.261 and these rules, unless the context requires otherwise:

- (1) "Administrator" means the Administrator of the Wage and Hour Division.
- (2) "Adult" means an individual of 18 years of age or more.
- (3) "Adult foster home" means any family home or facility in which residential care is provided in a homelike environment for five or fewer adults who are not related to the provider by blood or marriage.
- (4) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, fur-bearing animals, or poultry and any practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. "Agricultural employment" is employment in "Agriculture" as herein defined.
- (5) "Bureau" means Bureau of Labor and Industries.
- (6) "Casual basis" as used in ORS 653.020(2) and these rules means employment which is irregular and intermittent and which is not performed by an individual whose vocation is providing domestic services.
- (7) "Child care service person" means an individual who performs child care services in the home of the individual or the child and who during any part of a 24 hour period provides custodial care and protection to infants or children.

(8) "Commissioner" means the Commissioner of the Bureau of Labor and Industries.

(9) "Commissions" or "pay on a commission basis" means payment based on a percentage of total sales, or of sales in excess of a specified amount, or on a fixed allowance per unit agreed upon as a measure of accomplishment or on some other formula and may be the sole source of compensation or payment in addition to other compensation.

(10) "Companionship services", as used in ORS 653.020(14) and in these rules, means those services which provide fellowship, care and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the elderly or infirm person such as meal preparation, bed making, washing of clothes and other similar services. They may also include the performance of general household work: provided, however, that such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked. Individuals employed in domestic service employment in or about a family home to provide companionship services are not required to be employed by the individual for whom they provide such services. The term "companionship services" does not include services relating to the care and protection of the elderly or infirm which require and are performed by trained personnel, such as a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a family home.

(11) "Division" means the Wage and Hour Division of the Bureau of Labor and Industries.

(12) "Domestic service" means services of a household nature performed by an employee in or about a family home (permanent or temporary) of the person by whom the employee is employed. The term includes, but is not limited to, employees such as cooks, waiters, butlers,

valets, maids, housekeepers, governesses, nurses, janitors, gardeners, and companions to the elderly and infirm.

(13) "Domicile" means the permanent residence of a person or the place to which that person intends to return even though that person may actually reside elsewhere.

(14) "Employed on a seasonal basis at", as used in ORS 653.020(10) and in these rules, means employment that occurs during the time the organized camp provides services to campers at the camp site where campers are located. The term includes employment at the camp site in duties preparatory to the opening or closing of the camp site. The term includes employment during the camping season only and does not include full time, year around employment.

(15) "Employer" has the same meaning as that in ORS 653.010(3).

(16) "Employer's location" means any place where an employer employs any employee for more than an incidental period of time during the employee's established workweek. An employer has more than one location if the employer has employees performing work in multiple regions during the same pay period. For example, an employer whose headquarters is located in Region 1 who provides contracted janitorial services to buildings in Region 1 and Region 2 is located in both Region 1 and Region 2.

[(16)](17) "Fair market value" means an amount not to exceed the retail price customarily paid by the general public for the same or similar meals, lodging or other facilities or services provided to the employee by the employer. In determining the fair market value of meals, lodging and other facilities and services, the bureau will be guided by these rules and by Title 29, CFR Part 531 — Wage Payments under the Fair Labor Standards Act of 1938, where applicable.

[(17)](18) "Family home", as used in ORS 653.020(2) and this section, means a residence, the purpose of which is to provide an abode for the owner or renter of the residence and family

members of the owner or renter. For example, a boarding house or an adult foster care home are not family homes for purposes of ORS 653.020(2) and these rules. However, when casual domestic service work is performed in structures where the owner or renter resides and operates a business, such work may qualify as exempt under ORS 653.020(2) depending upon all the facts of the particular arrangement.

[(18)](19) "Homeworker" means any employee suffered or permitted to produce goods or services for an employer in or about a home, apartment or room in a residence in which that employee or other employees of an employer resides, regardless of the source of the materials used by the homeworker in such production.

[(19)](20) "Hours worked" means all hours for which an employee is employed by and required to give to the employer and includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place and all time the employee is suffered or permitted to work. "Hours worked" includes "work time" as defined in ORS 653.010(11).

[(20)](21) "Immediate family" means grandfather, grandmother, father, mother, son, daughter, sister, brother, uncle or aunt.

(22) "Incidental period of time" means less than four (4) hours of an employee's compensable time during any workweek. Time spent by an employee in a region solely for the purpose of travelling through the region from a point outside the region to another outside the region with no employment or work-related stops is an incidental period of time.

[(21)](23) "Minimum wage" means the rate of pay prescribed in ORS 653.025 and 653.030.

[(22)](24) "Minor" means an individual of 17 years of age or less.

[(23)]**(25)** "Organized camp" has the same meaning as that in ORS 653.010(6).

[(24)]**(26)** "Primary duty" means, as a general rule, the major part, or over 50 percent, of an employee's time. However, a determination of whether an employee has management as the employee's primary duty must be based on all the facts of a particular case. Time alone is not the sole test and in situations where the employee does not spend over 50 percent of the employee's time in managerial duties, the employee might have management as a primary duty if other pertinent factors support such a conclusion. Factors to be considered include, but are not limited to, the relative importance of the managerial duties as compared with other duties, the frequency with which the employee exercises discretionary powers, the relative freedom from supervision and the relationship between the salary paid the employee and wages paid other employees for the kind of non-exempt work performed by the supervisor.

[(25)]**(27)** "Primary school" means a learning institution containing any combination of grades Kindergarten - 8 or age level equivalent.

(28) "Region" means the following:

(a) "Region 1" means the area described in ORS 653.025(1), which includes all parts of the state of Oregon not specifically included in Region 2 or Region 3 as defined.

(b) "Region 2" means the area described in ORS 653.025(2), which includes the areas in the counties of Multnomah, Washington and Clackamas counties that are within the urban growth boundary as identified by the metropolitan service district.

(c) "Region 3" means the area described in ORS 653.025(3), which includes the counties of Baker, Coos, Crook, Curry, Douglas, Gilliam, Grant, Harney, Jefferson, Klamath, Lake, Malheur, Morrow, Sherman, Umatilla, Union, Wallowa and Wheeler.

[(26)]**(29)** "Reside" means a personal presence at some place of abode with no present intention of definite and early removal and with the intent to remain for an undetermined period, but not necessarily combined with the intent to stay permanently.

[(27)]**(30)** "Resident manager" means an employee of an adult foster home who is domiciled at the home and who is directly responsible for the care of residents in the home on a day to day basis.

[(28)]**(31)** "Salary" means a predetermined amount constituting all or part of the employee's compensation paid for each pay period of one week or longer (but not to exceed one month). The predetermined amount may not be any amount less than the equivalent of a monthly salary calculated by multiplying the wage set pursuant to ORS 653.025 by 2,080 hours per year, then dividing by 12 months.

[(29)]**(32)** "Salary basis" means a salary as defined in section (28) of this rule, which is not subject to deduction because of lack of work for part of a work week, however, deductions for absences of one day or more may be made if the employee is absent for other reasons.

Deductions may not be made for absences of less than one day, except as permitted for employers covered by the federal Family and Medical Leave Act of 1993, Public Law 103-3, for part-day absences due to leave pursuant to that law. Employees who are not paid for workweeks in which they performed no work are considered to be on a salary basis provided they are paid on a salary basis in workweeks when work is performed.

(a) Payment of additional compensation is not inconsistent with the salary basis of payment.

(b) Compensation paid in the form of fees is not inconsistent with the salary basis of payment, provided the fees paid in each pay period are not less than the amount required to be paid

pursuant to ORS 653.025 and meet the requirements for fee payments under Title 29, Code of Federal Regulations, Part 541.605 and related regulations as amended April 23, 2004.

[(30)]**(33)** "Secondary school" means a learning institution containing any combination of grades 9–12 or age level equivalent and includes those institutions that provide junior high schools which include 9th grade.

[(31)]**(34)** "Violation" means a transgression of any statute or rule, or any part thereof and includes both acts and omissions.

[(32)]**(35)** "Willfully" means knowingly. An action is done knowingly when it is undertaken with actual knowledge of a thing to be done or omitted or action undertaken by a person who should have known the thing to be done or omitted. A person "should have known the thing to be done or omitted" if the person has knowledge of facts or circumstances which, with reasonably diligent inquiry, would place the person on notice of the thing to be done or omitted to be done. A person acts willfully if the person has the means to inform [*himself or herself*]**the person's self** but elects not to do so. For purposes of these rules, the employer is presumed to know the requirements of ORS 653.010 to 653.261 and these rules.

(36) "Workweek" means any seven (7) consecutive twenty four (24) hour period as determined by the employer. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the payment of minimum wage requirements of this rule.

839-020-0010

Payment of Minimum Wages -- Generally

(1) Unless exempt under ORS 653.020, an employer that employs any employee in the state of Oregon is required to pay each employee employed in the state no less than the minimum rate of wage specified in SB 1532 (2016) for each hour worked by the employee based on the employer's location as specified in the law.

(2) Employees shall be paid no less than the applicable minimum wage for all hours worked, which includes "work time" as defined in ORS 653.010(11). If in any pay period the combined wages of the employee are less than the applicable minimum wage, the employer shall pay, in addition to sums already earned, no less than the difference between the amounts earned and the minimum wage as prescribed by the appropriate statute or administrative rule.

[(2)](3) In the event an employee performs work for more than an incidental period of time in more than one region during a workweek and the minimum rates of wage for the regions are different pursuant to SB 1532 (2016), the employer must pay the employee no less than the hourly rate of pay at either:

(a) The highest rate of wage required for any region specified in the law in which the employee worked during the workweek for all hours worked by the employee; or

(b) The applicable minimum rate of wage for each hour worked in each region in which the employee worked during the workweek.

(4) An employer is not required to pay an employee a higher rate of wage for work performed in a region for less than an incidental period of time in a workweek. However, an employer may not pay an employee a rate of wage that is less than the lowest applicable minimum rate of wage provided in ORS 653.025 for any hours worked.

General Recordkeeping Requirements

839-020-0080

General Requirements

(1) Every employer regulated under ORS 653.010 to 653.261 must maintain and preserve payroll or other records containing the following information and data with respect to each employee to whom the law applies:

(a) Name in full, as used for Social Security recordkeeping purposes, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records;

(b) Home address, including zip code;

(c) Date of birth, if under 19;

(d) Occupation in which employed;

(e) Time of day and day of week on which the employee's workweek begins. If the employee is part of a work force or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole work force or establishment will suffice;

(f) Regular hourly rate of pay for any workweek in which overtime compensation is due, and an explanation of the basis of pay by indicating the monetary amount paid on a per hour, per day, per week, per piece, commission on sales, or other basis, and the amount and nature of each payment which, pursuant to ORS 653.261(1) is excluded from the "regular rate of pay". (These records may be in the form of vouchers or other payment data.);

(g) Hours worked each workday and total hours worked each workweek (for purposes of this section, a "workday" is any fixed period of 24 consecutive hours and a "workweek" is any fixed and regularly recurring period of seven consecutive workdays);

(h) **Except as provided in section (2), the location of hours worked each workday;**

(i) Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation;

[(i)]**(j)** Total premium pay for overtime hours. This amount excludes the straight-time earnings for overtime hours recorded under subsection (h) of this section;

[(j)]**(k)** Total additions to or deductions from wages paid each pay period including employee purchase orders or wage assignments. Also, in individual employee records, the dates, amounts, and nature of the items which make up the total additions and deductions;

[(k)]**(l)** Total wages paid each pay period;

[(l)]**(m)** Date of payment and the pay period covered by payment.

(2) Notwithstanding the provisions of subsection (1)(h), employers are not required to maintain and preserve records pertaining to the location of work performed by an employee if the employee performs work in more than one region during the employee's pay period and the employer pays the employee for all hours worked at no less than the applicable minimum rate of wage for the region having the highest required rate of pay where work was performed by the employee in that pay period pursuant to 839-020-0010(3)(a).

(3) Every employer who makes retroactive payment of wages or compensation under the supervision of the U.S. Department of Labor or the Oregon Bureau of Labor and Industries must

record and preserve, as an entry on the pay records, the amount of such payment to each employee, the period covered by such payment, and the date of payment.

[(3)](4) With respect to employees working on fixed schedules, an employer may maintain records showing instead of the hours worked each day and each workweek as required by this rule, the schedule of daily and weekly hours the employee normally works, provided:

(a) In weeks in which an employee adheres to this schedule, indicates by check mark, statement or other method that such hours were in fact actually worked by the employee; and

(b) In week in which more or less than the scheduled hours are worked, shows that exact number of hours worked each day and each week.

[(4)](5) With respect to each employee in a bona fide executive, administrative, or professional capacity (including employees employed in the capacity of academic administrative personnel or teachers in elementary or secondary schools), or in outside sales, as defined in ORS 653.010(8), employers must maintain and preserve records containing all the information and data required by subsections (1)(a) through (e) of this rule and, in addition, the basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and perquisites.

[(5)](6) With respect to each employee of hospitals and institutions primarily engaged in the care of persons who are sick or aged or have mental illness or mental retardation and who reside on the premises compensated for overtime work on the basis of a work period of 14 consecutive days pursuant to an agreement or understanding under OAR 839-020-0125(2)(d), employers must maintain and preserve:

(a) The records required by section (1) of this rule except subsections (1)(e) and (g) through (i) of this rule, and in addition:

- (A) Time of day and day of week on which the employee's 14-day work period begins;
- (B) Hours worked each workday and total hours worked each 14-day work period;
- (C) Total straight-time wages paid for hours worked during the 14-day work period;
- (D) Total overtime excess compensation paid for hours worked in excess of eight in a workday and 80 in the work period.

(b) A copy of the agreement or understanding with respect to using the 14-day period for overtime pay computations or, if such agreement or understanding is not in writing, a memorandum summarizing its terms and showing the date it was entered into and how long it remains in effect.

[(6)](7) With respect to each tipped employee, the employer must maintain and preserve payroll or other records containing all the information and data required in section (1) of this rule and, in addition, a symbol, letter or other notation placed on the pay records identifying each employee.